



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2015-0850; FRL-9989-09-Region 6]

Air Plan Approval; New Mexico; Approval of Revised Statutes; Error Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving revisions to New Mexico's State Implementation Plan (SIP) that incorporate updates to the New Mexico statutes. EPA is also correcting its previous approval of some statute provisions as approval of these provisions into the SIP was in error.

DATES: This rule is effective on **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** without further notice, unless the EPA receives relevant adverse comment by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If the EPA receives such comment, the EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2015-0850, at <https://www.regulations.gov> or via email to Riley.Jeffrey@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions

(audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Jeff Riley, (214) 665-8542, Riley.Jeffrey@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Jeff Riley, (214) 665-8542,

Riley.Jeffrey@epa.gov. To inspect the hard copy materials, please schedule an appointment with Jeff Riley or Mr. Bill Deese at (214) 665-7253.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Background

A. CAA and SIPs

Section 110 of the CAA requires states to develop and submit to the EPA a SIP to ensure that state air quality meets National Ambient Air Quality Standards. These ambient standards currently address six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, lead,

particulate matter, and sulfur dioxide. Each federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin through air pollution regulations and control strategies. The EPA approved SIP regulations and control strategies are federally enforceable.

B. New Mexico's Submittals

On August 6, 2015, the New Mexico Environment Department (NMED) provided a demonstration of how the existing New Mexico SIP met the applicable section 110(a)(2) requirements for the revised primary annual fine particulate matter (PM_{2.5}) National Ambient Air Quality Standard (NAAQS) promulgated on December 14, 2012 (78 FR 3085, January 15, 2013). Additionally, NMED provided updates to statutes originally approved into the SIP on November 2, 1984 (49 FR 44099). Sections 110(a)(2)(E)(ii) and 128 of the CAA require SIPs to contain statutory or regulatory provisions that: (1) Any board or body which approves permits or enforcement orders under the CAA have at least a majority of its members represent the public interest and not derive any significant portion of their income from persons subject to permits or enforcement orders under the CAA; and (2) any potential conflict of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed. EPA approved updates to statutes under New Mexico Statutes Annotated 1978 (NMSA) Chapter 10, Article 16 and NMSA 1978 Chapter 74, Articles 1 & 2 to satisfy the CAA sections 110(a)(2)(E)(ii) and 128 requirements. However, the August 6, 2015 State submittal included other updated statutes under NMSA 1978 Chapter 9, Article 7A and NMSA 1978 Chapter 74, Articles 1 & 2 that EPA did not act upon. See EPA's proposal (82 FR 60933, December 26, 2017) and final approval (83 FR 12493, March 22, 2018) for further detail.

C. Error Corrections Under CAA Section 110(k)(6)

Section 110(k)(6) of the CAA provides EPA with the authority to make corrections to prior SIP actions that are subsequently found to be in error in the same manner as the prior action, and to do so without requiring any further submission from the State. On March 6, 2013, the Eleventh Circuit Court of Appeals issued a 2-1 decision relevant to EPA authority under Section 110(k)(6). *See Alabama Environmental Council v. EPA*, 711 F.3d 1277 (11th Cir. 2013). The majority opinion found that CAA section 110(k)(6) permits EPA to revise a SIP provision approved “in error” without any further submission from the State, so long as EPA provides the State and the public with its error determination and the basis thereof. This affirms EPA’s authority to use section 110(k)(6) to revise a prior action related to a state’s implementation plan. *See* 711 F3d at 1287.

While CAA section 110(k)(6) provides EPA with the authority to correct its own “error,” nowhere does this provision or any other provision in the CAA define what qualifies as “error.” Thus, EPA believes that the term should be given its plain language, everyday meaning, which includes all unintentional, incorrect or wrong actions or mistakes.

D. What Criteria must be met for the EPA to Approve this SIP revision?

Under section 110(a)(2) of the CAA, states are required to develop and maintain an air quality management program that meets various basic structural requirements, including, but not limited to: enforceable emission limitations; an ambient monitoring program; an enforcement program; air quality modeling capabilities; and adequate personnel, resources, and legal authority as per 40 CFR 51.230. This “infrastructure SIP” requirement is met through state submittal of SIPs that implement, maintain, and enforce a new or revised NAAQS within 3 years of EPA issuing the standard. An air agency may cite existing EPA-approved provisions and/or adopt new or revised statutory authorities and regulations, as necessary, in order to address each

element of the infrastructure SIP.¹ In accordance with 40 CFR 51.231, the infrastructure SIP submission should identify the provisions of law or regulations that the air agency determines provide the necessary authority, and the air agency should submit copies of those laws or regulations with the infrastructure SIP submission.

II. The EPA's Evaluation

As noted above, EPA's March 22, 2018 final action approved updates to statutes under NMSA 1978 Chapter 10, Article 16 and NMSA 1978 Chapter 74, Articles 1 & 2 to satisfy the CAA sections 110(a)(2)(E)(ii) and 128 requirements. However, the August 6, 2015 State submittal also included updated statutes under NMSA 1978 Chapter 9, Article 7A and NMSA 1978 Chapter 74, Articles 1 & 2 that EPA did not act upon. EPA has evaluated these remaining updated statutes against the criteria established by section 110(a)(2) of the CAA to determine if these provisions are integral to meeting the basic structural requirements of an air quality management program. Similarly, EPA has evaluated the SIP-approved statutes under NMSA 1978 Chapter 74, Articles 1 and 2 to determine if elements of our November 2, 1984 final approval were in error and should therefore be removed from the New Mexico SIP. Below is a summary of EPA's evaluation; see our Technical Support Document (TSD) prepared in conjunction with this SIP revision for more information concerning our evaluation.

EPA has determined that the State's updates to the NMSA 1978 sections represented in Table 1 grant the Environmental Improvement Board (EIB) and/or NMED with authority for SIP development, enforcement, inspections, construction and operating permits, air monitoring,

¹ "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act sections 110(a)(1) and 110(a)(2)," Memorandum from Stephen D. Page, September 13, 2013, https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf.

development of air quality studies and modeling, reporting, consultation, assurance of adequate implementation, and addressing of environmental emergencies.

**Table 1. August 6, 2015 Updates to NMSA 1978 Chapter 74, Article 2
Sections for Approval to New Mexico SIP**

NMSA 1978 Section	Title	Content
74-2-1	Short Title	Identifies NMSA 1978 Chapter 74, Article 2 as Air Quality Control Act (AQCA)
74-2-2	Definitions	Definitions used in AQCA
74-2-3	Environmental improvement board	Establishes jurisdiction of EIB
74-2-5	Duties and powers; environmental improvement board; local board	Grants EIB authority for SIP development, enforcement, air monitoring, reporting, assurance of adequate implementation
74-2-7	Permits	Provides EIB with authority for construction and operating permits
74-2-10	Emergency powers of the secretary and the director	Provides NMED with authority to address environmental emergencies
74-2-11.1	Limitations on regulations	Specifies limitations to EIB and local board authorities, jurisdictions
74-2-17	Continuing effect of existing laws, rules and regulations	Establishes precedence of AQCA over any conflicting legislation

These sections establish an air quality management program for New Mexico that meets the various basic structural requirements of CAA section 110(a)(2), and therefore their inclusion into the SIP is warranted and appropriate. We find the State's submitted revisions to these sections to be non-substantive and consistent with the CAA. EPA is approving these revisions into the New Mexico SIP.

EPA has determined that our November 2, 1984 final approval of the NMSA 1978 sections represented in Table 2 was done in error, and these sections should therefore be removed from the New Mexico SIP.

**Table 2. NMSA 1978 Chapter 74, Article 2
Sections for Removal from New Mexico SIP**

NMSA 1978 Section	Title	Reason for Removal
74-2-6	Adoption of Regulations; Notice and Hearings	Administrative requirements, hearing board procedures
74-2-8	Variances	Inconsistent with federally-enforceable requirements
74-2-9	Variances – Judicial Review	Inconsistent with federally-enforceable requirements
74-2-11	Confidential Information	Duplicative of SIP-approved regulation (20.2.1.115 NMAC)
74-2-12	Enforcement	SIP-approved 74-2-4.D provides EIB & secretary with enforcement authority
74-2-13	Inspection	SIP-approved 74-2-5.1A provides department/local agency inspection authority
74-2-14	Penalties	Inconsistent with federally-enforceable requirements
74-2-15	Additional Means of Enforcement	Inconsistent with federally-enforceable requirements
74-2-16	Declaratory Judgement on Regulations	Inconsistent with federally-enforceable requirements

These elements are appropriate for state and local agencies to adopt and implement, but it is not necessary or appropriate to make them federally enforceable by incorporating them into the applicable SIP. Moreover, inclusion of sections 74-2-8, 74-2-9, 74-2-14, 74-2-15, and 74-2-16 into the SIP present inconsistencies with the Act, and Federal requirements. EPA is removing these sections from the New Mexico SIP, and will not act upon updates to these sections contained in the State's August 6, 2015 submittal.

Further, the State's submittal identified NMSA 1978, section 74-2-15.1 (*Primary Nonferrous Smelter Orders*) as having been repealed by the State in 1992. EPA will act accordingly to remove this section from the SIP.

III. Final Action

We are approving revisions to the New Mexico SIP that pertain to updated statutes under NMSA 1978 Chapter 74, Article 2 contained in the State's August 6, 2015 submittal. We are also making an error correction to remove from the New Mexico SIP certain statutes under NMSA 1978 Chapter 74, Article 2 originally approved in our November 2, 1984 rulemaking.

The EPA is publishing this rule without prior proposal because we view this as a non-controversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This rule will be effective on **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** without further notice unless we receive relevant adverse comment by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If we receive relevant adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now. Please note that if we receive relevant adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the revisions to the New Mexico statutes as described in the Final Action section above. The EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 6 Office (please contact Jeff Riley, (214) 665-8542, Riley.Jeffrey@epa.gov for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation (62 FR 27968, May 22, 1997).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct

costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: February 14, 2019.

Anne Idsal,
Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart GG – New Mexico

2. In § 52.1620(e), the table titled “EPA-Approved New Mexico Statutes” is amended under “Chapter 74—Environmental Improvement” by:

- a. Revising the entries for Sections 74-2-1, 74-2-2, 74-2-3, and 74-2-5;
- b. Removing the entry for Section 74-2-6;
- c. Revising the entry for Section 74-2-7;
- d. Removing the entries for Sections 74-2-8 and 74-2-9;
- e. Revising the entry for 74-2-10;
- f. Removing the entry for Section 74-2-11;
- g. Revising the entry for Section 74-2-11.1;
- h. Removing the entries for Sections 74-2-12, 74-2-13, 74-2-14, 74-2-15, 74-2-15.1, and 74-2-16; and
- i. Revising the entry for Section 74-2-17.

The revisions read as follows:

§ 52.1620 Identification of plan.

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(e) * * *

EPA-APPROVED NEW MEXICO STATUTES

State citation	Title/subject	State Approval/ effective date	EPA approval date	Comments
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New Mexico Statutes				
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Chapter 74—Environmental Improvement				
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74-2-1	Short Title	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
74-2-2	Definitions	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
74-2-3	Environmental improvement board	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
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74-2-5	Duties and powers; environmental improvement board; local board	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
74-2-7	Permits; permit appeals to the environmental improvement board or the local board; permit fees	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	

74-2-10	Emergency powers of the secretary and the director	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
74-2-11.1	Limitations on regulations	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
74-2-17	Continuing effect of existing laws, rules and regulations	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
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[FR Doc. 2019-02862 Filed: 2/26/2019 8:45 am; Publication Date: 2/27/2019]